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Barrett Financial Group, LLC

THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Bonnie Creech,

Plaintiff,

vs.

Barrett Financial Group, L.L.C.; Broker
Solutions, Inc., dba Kind Lending, Kind
Lending, L.L.C.; John Claude Hegglin, an
individual, and as an agent of Barrett Financial
Group, L.L.C., Broker Solutions, Inc., dba
Kind Lending; and Kind Lending L.L.C.; and
Jane and John Doe employees 1-10.

Defendants

Case No.: CV-22-00871-PHX-SMB

**DEFENDANT BARRETT FINANCIAL
GROUP'S MOTION FOR LEAVE TO
WITHDRAW ITS 12(B)(6) MOTION TO
DISMISS AND FOR LEAVE TO REFILE
OR, ALTERNATIVELY, MOTION TO
AMEND 12(B)(6) MOTION**

Financial Group respectfully requests that the Court grant Defendant leave to withdraw its 12(b)(6) Motion to Dismiss (DE 15) without prejudice to re-filing it if the parties are unable to agree that defects in Plaintiff's Complaint are curable by a permissible amendment. Alternatively, Defendant moves to amend its 12(b)(6) motion by filing the certification required by LRCiv. 12.1(c).

DISCUSSION

On August 25, 2022, the parties stipulated to extend the deadline to file a responsive pleading. This was done to allow the parties to engage in good faith settlement negotiations. Those efforts failed. Consequently, on the agreed upon deadline of September 2, 2022, Barrett Financial Group

1 filed its 12(b)(6) Motion to Dismiss. While Defendant's motion was timely filed it was also filed
2 before the parties had conferred as required by LRCiv. 12.1(c). On September 5, Defendant emailed
3 Plaintiff's counsel to notify her regarding the lack of certification and to engage in the meet and
4 confer required under the rule:

5 (c) Motions to Dismiss for Failure to State a Claim or for Judgment on the
6 Pleadings. No motion to dismiss for failure to state a claim or counterclaim,
7 pursuant to Federal Rule of Civil Procedure 12(b)(6), or motion for judgment on
8 the pleadings on a claim or counterclaim, pursuant to Federal Rule of Civil
9 Procedure 12(c), will be considered or decided unless the moving party includes a
10 certification that, before filing the motion, the movant notified the opposing party
of the issues asserted in the motion and the parties were unable to agree that the
pleading was curable in any part by a permissible amendment offered by the
pleading party. The movant may comply with this rule through personal,
telephonic, or written notice of the issues that it intends to assert in a motion. A
motion that does not contain the required certification may be stricken summarily.

11 In response Plaintiff requested that Defendant withdraw its motion "until [the parties] confer and
12 [Plaintiff's Counsel] has had time to review the filing."

13 Plaintiff's request is proper. However, a unilateral withdrawal of the 12(b)(6) motion creates
14 the potential of default under Rule 55. Defendant files this motion out of an abundance of caution.
15 Defendant respectfully requests leave to withdraw its 12(b)(6) motion and that it be allowed to re-file
16 its motion if the parties cannot agree that defects in Plaintiff's Complaint may be cured by
17 amendment.

18 As an alternative, Defendant moves to amend its 12(b)(6) motion by filing the required
19 LRCiv. 12.1(c) certification, and that Plaintiff's Response be due commencing from the date
20 Defendant files its LRCiv. 12.1(c) certification. A motion to dismiss is not a pleading within the
21 meaning of Rule 15(a). See Fed.R.Civ.P. 7(a); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327,
22 1344 (11th Cir. 2010). And Defendant has found no procedural rule addressing amendments of
23 motions to dismiss, and none specifically addressing certifications under LRCiv. 12.1(c). The Federal
24 Rules of Civil Procedure, however, are to "be construed and administered to secure the just, speedy,
25 and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. A district court

1 possesses inherent authority to control its proceedings under 28 U.S.C. § 1651; *see also Martin v.*
2 *Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir. 2002).

3 **CONCLUSION**

4 For the above reasons, Defendant respectfully moves the Court for an order permitting the
5 withdrawal of its 12(b)(6) motion to allow Defendant to address the issues raised therein and to
6 determine whether the defects alleged in Plaintiff's Complaint can be cured by permissible
7 amendment. Alternatively, Defendant moves for an order permitting it to file its certification under
8 LRCiv. 12.1(c).

9 RESPECTFULLY SUBMITTED this 9th day of September 2022.

10 **WRIGHT LAW FIRM, PLC**

11 By: /s/ Roger A. Wright

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17 *Counsel for Barrett Financial Group, LLC*

CERTIFICATE OF SERVICE

I certify that, on September 9th, 2022, I filed the foregoing Barrett Financial Group's Motion to Dismiss via the Court's electronic filing system.

**DEFENDANT BARRETT FINANCIAL GROUP'S MOTION FOR LEAVE TO
WITHDRAW ITS 12(b)(6) MOTION TO DISMISS AND FOR LEAVE TO REFILE OR,
ALTERNATIVELY, MOTION TO AMEND 12(b)(6) MOTION**

The Court's electronic filing system will provide notice and a copy of this filing to the following electronic filing registrants:

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